NGA SHEAU SHEAU

v.

UNITED MERCHANT FINANCE BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 1-22-292-1999]
2 JUNE 2004

CONTRACT: *Terms - Condition precedent - Whether borrower complied with condition precedent in loan agreement - Whether borrower's death an act of default - Whether loan agreement void and defendant no longer bound thereof - Whether plaintiff suffered any damages*

CIVIL PROCEDURE: *Appearance - Unconditional appearance - Whether defendant precluded from raising issue of plaintiff's locus standi in writ*

This was a claim by the plaintiff against the defendant for the specific performance of a loan agreement cum assignment ('loan agreement') in respect of certain property ('the property'), or alternatively, special damages amounting to RM26,198 being the plaintiff's costs in acquiring the property from the developer. The plaintiff sued as the widow of Chong Sau Nan, the deceased, who during his lifetime as a purchaser executed a sale and purchase agreement with the developer Ornaresort Bhd as the vendor. The deceased as borrower and the defendant as lender had entered into the loan agreement whereby the borrower agreed to take a loan from the defendant with the defendant approving the loan, subject to a special express condition in the loan agreement requiring the borrower to take up a mortgage reducing term assurance for a sum insured equivalent to the value of the loan and equivalent to the duration of the loan ('mortgage assurance'). The loan agreement was executed by both the borrower and the defendant; the borrower, however, passed away without taking up the mortgage assurance.

The issues requiring determination were: (i) whether the defendant, having entered an unconditional appearance, was precluded from raising the issue of the plaintiff's *locus standi* in this writ; (ii) whether the borrower had complied with the condition precedent contained in the defendant's letter of offer that was subsequently included in the loan agreement which required the borrower to take up the mortgage assurance; (iii) whether the borrower's death was deemed an act of default under cl. 10(f) of the loan agreement; (iv) whether the borrower's death had rendered the defendant's letter of offer and loan

agreement void so that the defendant was no longer bound thereunder; and (v) whether the plaintiff had suffered any damages and, if so, the quantum to be awarded.

Held (dismissing the plaintiff's claim):

[1] It is trite law that once the defendant has filed an unconditional appearance, as in the present case, the defendant has effectively waived any irregularity of the plaintiff's writ, thus precluding it from raising a preliminary objection based on the plaintiff's *locus standi*. (p 248 a)

[2] This court was unable to accept the plaintiff's contention that the defendant had, by executing the loan agreement, waived the condition precedent which required the borrower to take up the mortgage assurance. On the contrary, the incorporation of the special express condition into the loan agreement was a reaffirmation of the requirement for the condition precedent to be fulfilled by the borrower, which the borrower had not complied with. (p 252 g)

[3] Clause 10(f) of the loan agreement would only apply when the loan had been released by the defendant to the plaintiff pursuant to the loan agreement, which was not the case here as the loan had never been released at all. In fact, the borrower's death had resulted in the inability of the borrower to fulfil the special express condition *ie*, the taking up of the mortgage assurance. (p 253 b-c)

[4] There was no dispute that the death of the borrower had resulted in the impossibility of the borrower taking up the mortgage assurance under the special express condition. Such impossibility rendered the loan agreement void under s. 57(2) of the Contracts Act 1950. Additionally, the contract in question was a contingent contract, and by virtue of s. 33(b) of the Contracts Act 1950, contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until the event has happened, and if the event becomes impossible, the contract becomes void. (pp 254 a & 255 b-c)

[5] In respect of damages, this issue was still premature at this stage and would only be relevant after the defendant's liability under the loan agreement, had been determined by the court. As the loan agreement was void, no liability was attributable to the defendant. The plaintiff was not entitled to the equitable decree of specific performance or a claim for common law damages. (p 256 d-e)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] 26 MLJ 47 ***(refd)***

Arul Arulanendhu v. Manickam Angamuthu [1992] 3 CLJ 1415; [1992] 2 CLJ (Rep) 101 HC ***(refd)***

Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(dist)***

Dato' Mahmood Osman Merican lwn. Perbadanan Kemajuan Ekonomi Negeri Johor [1993] 2 CLJ 305 HC ***(refd)***

Eastacres Development Sdn Bhd v. Fatimah Mutallip & Anor [2000] 5 CLJ 379 HC ***(refd)***

Ho Weng Leong v. Ng Kee Chin [1996] 5 MLJ 139 ***(refd)***

Keshore Anupchand Metha & Anor v. Abrar Finance Bhd & Anor [2003] 5 CLJ 38 ***(refd)***

Lee Cheong Fah v. Soo Man Yoh [1996] 2 BLJ 356 HC ***(refd)***

Lee Seng Hock v. Fatimah Zain [1996] 4 CLJ 519 CA ***(refd)***

MBF Property Trust Management Bhd lwn. USRA Tampi (M) Sdn Bhd [2000] 1 CLJ 530 HC ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 HC ***(refd)***

Pembinaan Sepadu Jaya Sdn Bhd v. Weng Cheong Holdings Sdn Bhd [1998] 2 CLJ Supp 364 HC ***(refd)***

Perwira Habib Bank Malaysia Bhd lwn. Loo & Sons Realty Sdn Bhd & Anor (No 1) [1996] 4 CLJ 171 CA ***(refd)***

Public Finance Bhd v. Ehwan Saring [1996] 1 CLJ 628 HC ***(refd)***

Rengamah Rengasamy v. Tai Yoke Lai & Anor [1998] 1 CLJ 987 HC ***(refd)***

Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(refd)***

Sathiaval Maruthamuthu v. Shell Malaysia Trading Sdn Bhd [1998] 1 CLJ Supp 65 ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(dist)***

Standard Chartered Bank v. Kuala Lumpur Landmark Sdn Bhd [1991] 1 CLJ 801 HC ***(refd)***

The Avro International [1988] 1 MLJ 147 ***(refd)***

Welch v. Royal Exchange Assurance [1938] 4 All ER 289 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 32, 33(b), 57(2)

Other source(s) referred to:

Chitty on Contracts, 24th edn, vol 1, paras 691, 693

For the defendant - Khairil Aznan Azizi; M/s Andrew TS Goh & Khairil
For the plaintiff - Visalakshi Suparamaiam; M/s Sykt Rodziah

Reported by Suresh Nathan

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JUDGMENT

Low Hop Bing J:

Plaintiff's Claim

By this writ of summons, the plaintiff claims against the defendant for:

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1. the specific performance of a loan agreement cum assignment dated 11 November 1997 ("the loan agreement") in respect of the property held under B39 PT 3497 Orna Golf & Country Club, in the mukim of Air Panas, district of Jasin, state of Melaka ("the property"); or alternatively

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2. special damages amounting to RM26,198 being the plaintiff's costs in acquiring the property from the developer;

3. interest at 4% p.a. from the date of filing this writ to the date of judgment; and thereafter, at 8% p.a. to the date of realisation; and

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4. costs.

Agreed Facts

The parties herein have agreed to the following facts:

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The defendant is at all material time a company having a registered address on the 11th Floor, MUI Plaza, Jalan P. Ramlee 50200 Kuala Lumpur and a branch at No. 80-82, Jalan Bendahara, 75100 Melaka.

The plaintiff sues as the widow of Chong Sau Nan, the deceased who during his lifetime as a purchaser executed a sale and purchase agreement on 24

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December 1996 with the developer Ornaresort Bhd as the vendor ("the SPA").

On 11 November 1997, the deceased as borrower and the defendant as lender entered into the loan agreement whereby the borrower agreed to take a loan of RM60,000 ("the loan") from the defendant and the defendant has approved the loan, subject to the special express condition in the loan agreement which reads

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as follows:

> A Mortgage Reducing Term Assurance shall be taken up by the Borrower for a sum insured equivalent to the value of the Loan and for a period equivalent to the duration of the Loan. The beneficiary of the policy shall be the Lender.

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This special express condition was also contained in the defendant's letter of offer dated 4 June 1997 ("the letter of offer").

The loan agreement was executed by both the borrower and the defendant on 11 November 1997, and duly stamped on 12 November 1997.

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For brevity, the Mortgage Reducing Term Assurance shall be referred to hereinafter as "the mortgage assurance", and a reference to a clause hereinafter is a reference to that clause in the loan agreement, unless the context otherwise requires.

The borrower unfortunately passed away on 17 November 1997, without taking up the mortgage assurance.

Agreed Issues For Determination

The parties have agreed that the questions for determination herein are:

1. Whether the defendant having entered an unconditional appearance is precluded from raising the issue of the plaintiff's *locus standi* in this writ?
2. Whether the borrower has complied with the condition precedent contained in the defendant's letter of offer which was subsequently included in the loan agreement which requires the borrower to take up the mortgage assurance?
3. Whether the borrower's death is deemed an act of default under cl. 10(f) of the loan agreement?
4. Whether the borrower's death has rendered the defendant's letter of offer and loan agreement void so that the defendant is no longer bound thereunder?
5. Whether the plaintiff has suffered any damage and, if so, the quantum?

Submission For Parties And Decision Of The Court

1. Plaintiff's Locus Standi

For the defendant, learned counsel En. Khairil Aznan bin Azizi, raised a preliminary objection on the ground that the plaintiff has no *locus standi* as there was no privity of contract between the plaintiff and the defendant.

Cik Visalakshi a/p Suparamaiam, learned counsel for the plaintiff argued that the defendant having entered absolute appearance is not at liberty to raise the plaintiff's *locus standi.*

In my judgment, it must be stated here that the defendant's desire to raise the preliminary objection pertaining to the plaintiff's *locus standi* must be preceded by the filing of a conditional appearance but the defendant has not done so. The challenge based on the plaintiff's *locus standi* is in effect grounded on the irregularity of the writ filed by the plaintiff.

It is trite law that once the defendant has filed an unconditional appearance, as is the case here, the defendant has effectively waived any irregularity of the plaintiff's writ and so is precluded from raising a preliminary objection based on the plaintiff's *locus standi*: *The Avro International* [1988] 1 MLJ 147 at 149 CA Singapore, per Lai Kew Chai J.

The answer to question 1 is in the affirmative.

2. Mortgage Assurance

The plaintiff submits that the mortgage assurance is not a condition precedent as it did not provide for the time to take up and so this condition is void for uncertainty, as the court must look into the intention of the parties and not to the title of the contract, relying on *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; and *Chuah Eng Khong v. Malayan Banking Berhad* [1999] 2 CLJ 917.

She added that under cl. 35, the defendant has the discretion to take up and maintain a life assurance policy to guarantee the payment of all moneys secured under the loan agreement and all costs and expenses incurred shall become payable by the plaintiff to the defendant. Further it was stressed that the defendant has never required the plaintiff to take up and produce the mortgage assurance.

It was also argued for the plaintiff that the plaintiff has given a power of attorney to the defendant under cl. 31 and that with effect from the execution of the loan agreement on 11 November 1997, the responsibility to take up life assurance has shifted to the defendant.

Alternatively, it was contended for the plaintiff that the execution of the loan agreement before the taking up of the mortgage assurance shows that the defendant has waived this requirement.

The defendant contended that para 14(v) of the defendant's letter of offer and later included as special express condition in the loan agreement provide that the mortgage assurance is a condition precedent, relying on *Welch v. Royal Exchange Assurance* [1938] 4 All ER 289, and that it is the plaintiff's responsibility to take up the mortgage assurance with which the plaintiff has not complied, as a result of which the loan cannot be released. *Chitty on Contracts,* 24 edn. vol. 1 para 693 was cited.

He said that cl. 35 does not place an obligation on the defendant to take up a mortgage assurance for the plaintiff as that clause uses the word "may" and does not refer to any mortgage assurance at all.

As regards the power of attorney given by the plaintiff to the defendant, the defendant submitted that cl. 31 does not concern any mortgage assurance.

The defendant argued that the issue of the defendant's waiver does not arise.

I shall first consider the authorities cited for the plaintiff.

Sia Siew Hong, supra, concerns the proper construction by the Court of Appeal of a document described as a guarantee when it was an indemnity, and does not revolve around the issue of the non-fulfilment by a borrower to take up a mortgage assurance.

In *Chuah Eng Khong, supra*, the facts have no relevance whatsoever to the facts in the case before me. Further, the issues for determination by the Federal Court there have no semblance whatsoever with the agreed questions for determination in the instant case.

In short, none of the above two cases can be said to support the plaintiff's case.

In my judgment, an illustration of a condition precedent may be discerned from *Welch v. Royal Exchange Assurance, supra*. In that case, the claimant was insured with the defendants against fire, and the policy contained a condition by which the insured was to give to the insurers all such proofs and information with respect to any claim as might reasonably be required. The English Court of Appeal held that upon the proper construction of the condition, the insured was bound to give the required particulars within a reasonable time of being asked to do so. If he did not do so, and, indeed had not done so, he was barred from recovering under the policy, as this condition was a condition precedent.

Within our shores, in *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] 26 MLJ 47, the Privy Council advised that cl. 4 of the sale and purchase agreement there which required the vendor to obtain a renewal of the leases was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.

Chitty on Contract, 24th edn. vol. 1 Chapter 12 para 691 contains an instructive exposition on "conditions precedent" to the following effect:

1. Where the liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the happening of some further event, the contract is said to be subject to a condition precedent.

2. The failure of a condition precedent may have one of a number of effects e.g.

2.1 It may suspend the rights and obligations of both parties, as, for instance, where the parties enter into an agreement on the express understanding that it is not to become binding on either of them unless the condition is fulfilled;

2.2 One party may assume an immediate unilateral binding obligation, subject to a condition. From this he cannot withdraw; but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled; or

2.3 The parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfilment of the condition.

3. A condition precedent is, however, contingent and not promissory, and neither party will be liable to the other if the condition is not fulfilled.

On the agreed facts in the instant case, I am of the view that the defendant's letter of offer made it clear, unambiguous and unequivocal in para 14(v) that the loan is subject to the condition which now becomes the special express condition in the loan agreement.

Taking a purposive approach and upon a reasonable reading of para 14(v) of the defendant's letter of offer and the special express condition, I entertain no doubt that these two provisions concern a condition precedent which must be fulfilled by the borrower in order to avail himself of the loan. It is an essential requirement ie, a *sine qua non* that the borrower "shall" take up the mortgage assurance for a sum insured equivalent to the value of the loan and for a period equivalent to the duration of the loan and the lender ie, the defendant shall be the beneficiary of the policy.

Applying the exposition of "conditions precedent" by *Chitty on Contract, supra*, it is clear to me that the non-fulfilment of this condition precedent leaves a vacuum in the substratum of the loan. The loan agreement was therefore not binding on either the borrower or the defendant until the condition precedent is fulfilled. This condition precedent is contingent and not promissory and neither the borrower nor the defendant would be liable to the other if the condition precedent was not fulfilled.

Where, as in this case, no time limit has been set in the special express condition for the plaintiff to take up the mortgage assurance, it means that the borrower has to take up the mortgage assurance within a reasonable time. What is reasonable time depends on all the circumstances of the case and an objective test is to be applied.

The defendant's letter of offer containing the condition was issued on 4 June 1997 and the loan agreement was executed on 11 November 1997, while the borrower's untimely demise was on 17 November 1997. There was a lapse of a considerable period of some five months during the borrower's lifetime when the borrower was able and indeed in a position to take up the mortgage assurance.

It is indeed a pity that the borrower has not fulfilled this condition precedent during his lifetime and, alas, due to the supervening event of his untimely demise, was never ever able to take up the mortgage assurance.

Clause 35, on which the plaintiff relies, merits reproduction as follows:

CLAUSE 35. LIFE ASSURANCE POLICY

> The Lender may from time to time and at any time hereafter require the Borrower to take up and maintain a life assurance policy or any other policy guaranteeing the repayment of all the moneys hereby secured or any part thereof whether absolutely or on the happening of a contingency and to assign the said policy and benefits and advantages thereunder to the Lender as further security for all moneys hereby secured and any default by the Borrower in the taking up and maintaining of such policy and assigning the same as and when required, the Lender may at its discretion take up and maintain such policy guaranteeing the repayment of all moneys hereby secured or any part thereof on such terms as the Lender may think fit and all costs and expenses incurred by the Lender in taking out and maintaining the said policy shall become payable by the Borrower to the Lender with interest thereon at the Prescribed Rate with monthly rests and until payment shall be charged on the said Property.

Upon a proper perusal of cl. 35, it cannot be doubted that it confers upon the defendant a discretion to take up a life assurance policy generally as the word used is "may". On the other hand, cl. 14(v) of the defendant's letter of offer and the special express condition are special provisions which impose an obligation on the plaintiff when the word "shall" was used in relation to the mortgage assurance. Such special provisions would prevail over the general provisions under cl. 35. *Generalia specialibus non derogant.*

Further, the plaintiff seeks the support of cl. 31 concerning the appointment of the defendant as attorney which reads:

> For the consideration aforesaid the Borrower hereby irrevocably appoints the General Manager/the Assistant General Manager/Manager of the Lender or any person appointed by the Lender as Attorney for the Borrower and in the Borrower's name and on the Borrower's behalf to deal with the said Property in any manner whatsoever and to enforce all rights and remedies under the Agreement at any time the Lender may deem fit to do so even where no event

a of default as specified in Clause 10 hereof shall have occurred including the right to accept and to execute as Attorney for the Borrower the instrument of transfer of the said Property by the Vendor to the Borrower and to execute as Attorney for the Borrower the Memorandum or Memoranda of Charge in favour of the Lender to secure the Loan herein upon issuance of the strata/ separate document of title to the said Property and do all other things as fully b and effectually as the Borrower could do himself in connection therewith and in particular but without prejudice to the generality of the foregoing to assign sell let lease or demise the said Property or any part thereof and to do all whatsoever acts and execute all whatsoever documents to give effect to such assignment sale letting or lease which the Lender may deem necessary on any sale by the Lender of the Borrower's right title and interest in the said c Property under the power of sale conferred by this Agreement and to give a good receipt for the purchase moneys received and also to do and perform all whatsoever acts matter things necessary or expedient for the registration of this instrument as fully and effectually as the Borrower could do himself if he were personally present with power for such Attorney to substitute and d appoint one or more attorneys under him for all or any of the purposes aforesaid as he shall think fit AND the Borrower hereby agrees and undertakes at all times hereafter to ratify and confirm whatsoever the said Attorney or his attorney or attorneys shall lawfully do or cause to be in and concerning the said Property by virtue of this instrument.

e In my view, under cl. 31, the power of attorney was given by the borrower to the defendant to deal with the property and to enforce all rights and remedies under the loan agreement at any time the defendant may deem fit, including the right to accept and to execute as Attorney for the plaintiff the instrument of transfer of the property, the memorandum of charge in favour of the f defendant to secure the loan, and other matters connected therewith. Clause 31 makes no reference whatsoever to any mortgage assurance, and so cannot be construed as shifting to the defendant the responsibility to take up a mortgage assurance for the borrower.

I am unable to accept the plaintiff's contention that the defendant has, by g executing the loan agreement, waived the condition precedent which requires the borrower to take up the mortgage assurance. On the contrary, the incorporation of the special express condition into the loan agreement is a reaffirmation of the requirement for the condition precedent to be fulfilled by the borrower, which the borrower has not complied with.

h The answer to question 2 is therefore in the negative.

3. Default

In relation to question 3, it was submitted for the plaintiff that the plaintiff's claim is based on the defendant's failure to release the loan as agreed by the i defendant and that the death of the borrower is not a default within cl. 10, since cl. 10 has no application here.

In response, it was submitted for the defendant that the borrower's death comes within cl. 10(f).

In my judgment, cl. 10 provides for the list of events e.g. the borrower's death under cl. 10(f) which would constitute an act of default giving rise to the consequence of all sums of money owing under the loan agreement becoming immediately payable by the borrower to the defendant. Clause 10(f) only applies when the loan has been released by the defendant to the plaintiff pursuant to the loan agreement, which is not the case here as the loan has never been released at all.

In fact, the borrower's death has resulted in the inability of the borrower to fulfil the special express condition ie, the taking up of the mortgage assurance which has been considered in question 2 above.

On the facts of this case, the answer to question 3 is in the negative.

4. Assignment By Borrower

The plaintiff subscribes to the view that the borrower's death does not render the loan agreement void as the borrower ie, the deceased has pursuant to cl. 7 absolutely assigned the property to the defendant and so the loan agreement is still binding on the defendant.

The defendant contended that the loan agreement was rendered void due to the impossibility of taking up the mortgage assurance and so was no longer binding on the defendant.

Clause 7 reads as follows:

> **CLAUSE 7. ASSIGNMENT**
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> For the consideration aforesaid the Borrower hereby ABSOLUTELY ASSIGNS unto the Lender all the Borrower's rights title and interest in and to the said Property and the full and entire benefit of the Sale Agreement but without any of the liabilities thereunder PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provisions of this Agreement the Borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower expressed and contained in the Sale Agreement.

In my judgment, cl. 7 relates to the borrower giving an absolute assignment to the lender ie, the defendant of all rights title and interest in the property and the full and entire benefit of the SPA. Clause 7 must be read in the light of the special express condition for the purpose of taking up the mortgage assurance.

There is no dispute that the death of the borrower has resulted in the non-fulfilment by and indeed the impossibility of the borrower taking up the mortgage assurance under the special express condition. Such impossibility in my view renders the loan agreement void under s. 57(2) of the Contracts Act 1950 which, where relevant, provides:

> A contract to do an act which, after the contract is made, becomes impossible … becomes void ...

Section 57(2) is a statutory formulation of the common law doctrine of frustration when the contract to do an act eg, to give a loan in the instant case becomes impossible as a result of the non-fulfilment of the condition precedent.

Apart from unlawfulness, s. 57(2) envisages another instance resulting in the frustration of a contract ie, where a contract to do an act becomes impossible: see eg, *Standard Chartered Bank v. Kuala Lumpur Landmark Sdn Bhd* [1991] 1 CLJ 801; [1991] 3 CLJ (Rep) 773 per Lim Beng Choon J (as he then was); *Eastacres Development Sdn Bhd v. Fatimah Mutallip & Anor* [2000] 5 CLJ 379 per Abdul Malik Ishak J; *Keshore a/l Anupchand Metha & Anor v. Abrar Finance Bhd & Anor* [2003] 5 CLJ 38 per Abdul Malik Ishak J.

There are many enlightening judgments which serve as illustrations to s. 57(2).

In *Lee Seng Hock v. Fatimah bte Zain* [1996] 4 CLJ 519, the Court of Appeal held, inter alia, that when the subject matter of a sale and purchase agreement has been compulsorily acquired and compensation awarded, it gave rise to the frustration of the agreement so as to discharge the parties thereto of their obligations thereunder and the agreement was void as the performance of the agreement has become impossible under s. 57(2).

Where the special condition of a tenancy agreement expressly stated that the tenant (plaintiff) was to use the demised premises to carry on the business of karaoke, musical lounge and KTV, and there was an implied term that the landlord (defendant) should obtain the approval for conversion of the demised premises from housing to business, but the defendant has failed to obtain the approval, as in *Ho Weng Leong v. Ng Kee Chin* [1996] 5 MLJ 139, it was held by Abdul Malik Ishak J that there was a frustration of the tenancy agreement as the agreement has become impossible to perform.

In *Public Finance Bhd v. Ehwan bin Saring* [1996] 1 CLJ 628, the vehicle under a hire-purchase agreement was seized by the customs soon after the agreement was executed and had not been returned to either party since. Mohd Ghazali J (now JCA) held that it had become impossible for the appellant to pass a good title to the respondent and so the agreement had become void under s. 57(2).

An employee's inability to continue with his employment with the employer as a result of the two-year detention of the employee by the police under the Emergency (Public Order and Prevention of Crimes) Ordinance 1969 was held to have frustrated the employment contract: per Kang Hwee Gee J in *Sathiaval a/l Maruthamuthu v. Shell Malaysia Trading Sdn Bhd* [1998] 1 CLJ Supp 65.

Additionally, the contract in question is a contingent contract which is defined in s. 32 of the Contracts Act 1950 as a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.

Under s. 33, contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until the event has happened, and if the event becomes impossible, the contract becomes void: s. 33(b).

Section 33(b) was considered by the Federal Court in *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] 2 CLJ (Rep) 282 where Salleh Abas CJ(M) (later LP) held that where the sale and purchase of property was subject to the approval of the Foreign Investment Committee and no such approval was given, the contract did not take effect and the agreement became void in accordance with s. 33(b).

In *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn. Bhd.* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37, cl. 2 of the second agreement stipulated that if and when the then Land Code (Cap. 138) were amended to permit the club to grant to the company a lease of 99 years, the club would do so. The question for determination by Lim Beng Choon J (as he then was) was whether the contingent event in cl. 2 of the second agreement had been ineffective and impossible to perform as a result of the repeal of the Land Code by the National Land Code 1965 which does not provide for the grant of a 99 year lease. The learned judge held, *inter alia*, that since the contingent event has become impossible to perform, the second agreement has become void under s. 33(b).

A similar conclusion was reached by the learned judge pursuant to s. 33(b) in *Arul Arulanendhu v. Manickam Angamuthu* [1992] 3 CLJ 1415; [1992] 2 CLJ (Rep) 101 where the consent of the State Authority was required to transfer a piece of land but such consent was not forthcoming.

In *Dato' Mahmood bin Osman Merican lwn. Perbadanan Kemajuan Ekonomi Negeri Johor* [1993] 2 CLJ 305, cl. 7 of the agreement requires the approval of the Capital Issue Committee to effect the sale and purchase of shares, but no such approval was obtained, as a result of which Abdul Aziz bin Mohamad J (now JCA) held that he contingent contract was void under s. 33(b).

a See also *Lee Cheong Fah v. Soo Man Yoh @ Saw Man Yoke* [1996] 2 BLJ 356 per Abdul Malik Ishak J; *Perwira Habib Bank Malaysia Bhd. lwn. Loo & Sons Realty Sdn. Bhd. & Anor. (No: 1)* [1996] 4 CLJ 171 per Ahmad Fairuz Sheikh Abdul Halim JCA (now CJ, Malaysia; *Rengamah Rengasamy v. Tai Yoke Lai & Anor* [1998] 1 CLJ 987 per Augustine Paul JC (now JCA);
b *Pembinaan Sepadu Jaya Sdn Bhd v. Weng Cheong Holdings Sdn Bhd* [1998] 2 CLJ Supp. 364 per RK Nathan JC (now J); and *MBF Property Trust Management Bhd lwn. USRA Tampi (M) Sdn Bhd* [2000] 1 CLJ 530 per Faiza Tamby Chik J.

Hence, the answer to question 4 is in the affirmative.

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5. Damages To Plaintiff

In relation to this issue, it was submitted for the plaintiff that the plaintiff is entitled to damages as pleaded.

For the defendant it was argued that this issue is to be decided only after the
d court has arrived at a finding on liability.

The short answer to question 5 is that at this stage, this issue is premature and will only be relevant after the defendant's liability under the loan agreement has been determined by the court. As the loan agreement is void, no liability
e is attributable to the defendant.

6. Conclusion

On the foregoing grounds, I am of the view that the plaintiff is not entitled to the equitable decree of specific performance or a claim for common law damages. The plaintiff's claim is hereby dismissed.

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7. Costs

Since the defendant's preliminary objection has been overruled and the plaintiff's claim fails, I am of the view that the position of the parties *vis-à-vis* the question of costs has been placed in equilibrium, in which case, I order the
g parties herein to bear their own costs.

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